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No. 97-1958

In The

# Supreme Court of the United States

October Term, 1997

SMALL LANDOWNERS OF OAHU, AND RICHARD S. H. WONG, OSWALD K. STENDER, MARION M. L. LINDSEY, GERARD A. JERVIS, AND HENRY H. PETERS, in their capacities as Trustees of The Kamehameha Schools Bernice Pauahi Bishop Estate,

*Petitioners,*

vs.

CITY AND COUNTY OF HONOLULU,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the holding in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) that the "public use" requirement of the Fifth Amendment of the United States Constitution is "coterminous with the scope of a sovereign's police powers" is applicable to a local government's exercise of the eminent domain power assuring full, just compensation to landowners in order to address social evils threatening the local housing supply.

## PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding.

## RULE 29.6 STATEMENT

The City and County of Honolulu is governmental subdivision of the State of Hawaii and has no parent or non-wholly owned subsidiaries.

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## OPINIONS BELOW, JURISDICTION AND CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The City agrees with the Petitioners' identification of the Opinions Below, Jurisdictional Statement and Statement of Constitutional and Statutory Provisions Involved.

## STATEMENT OF THE CASE

In the State of Hawaii, including the City and County of Honolulu, a significant portion of housing supply was developed and marketed "leasehold." This meant that the "buyer" of a home actually purchased a long term lease. The leases typically provided for a fixed low rent for an initial period followed by "renegotiations" at which rents would periodically be increased to "fair market value" until the lease's expiration when all rights to the land and improvements revert to the lessor.

This "leasehold" system of "home ownership" was extensive in Hawaii where land titles were concentrated in the hands of a relatively few landowners.

In order to deal with social ills associated with this widespread "leasehold home ownership" pattern, the Hawaii Legislature in 1967 enacted Haw. Rev. Stat. Chapter 516 which used the eminent domain power to effect "lease-to-fee conversion." Chapter 516 provided a process for State condemnation of the lessors' interests in leasehold housing and for the State to sell the fee simple titles to the lessees. In *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), this Honorable Court rejected the challenge by the then trustees of Bishop Estate (the current

trustees are Petitioners in this proceeding) to Chapter 516 under the Public Use Clause of the Fifth Amendment:

> The Court long ago rejected any literal requirement that condemned property be put into use for the general public. 'It is not essential that the entire community, nor even any considerable portion, . . . directly enjoy or participate in any improvement in order [for it] to constitute a public use.' [citation omitted] [W]hat in its immediate aspect [is] only a private transaction may . . . be raised by its class or character to a public affair. As the unique way titles were held in Hawaii skewed the land market, exercise of the power of eminent domain was justified. The Act advances its purposes without the State's taking actual possession of the land. In such cases, government does not itself have to use property to legitimate the taking; it is only the taking's purpose and not its mechanics, that must pass scrutiny under the Public Use Clause.

467 U.S. at 244.

In upholding Chapter 516, this Court recognized that (1) no expenditure of public funds was involved, "funds to satisfy the condemnation awards have been supplied entirely by lessees", 467 U.S. at 234; and (2) there was no change in the use of the property, because "lessees retain possession of the property for private use throughout the condemnation process." 467 U.S. at 243.

Although Chapter 516 applied only to single family homes, the leasehold system of home development, which grew out of the Hawaii land oligopoly, had extended to condominium developments as well. In 1987 more than 70% of all of the condominium units in the

City and County of Honolulu were "leasehold."[1] Although there were a total of 17,882 owners of fee simple title to at least one Honolulu condominium unit,[2] one of those owners, Petitioner Bishop Estate, alone controlled the fee title to 10,940 units. By the time the ordinance was approved, Petitioner Bishop Estate's fee ownership of Honolulu leasehold condominium units had gone up to 12,500 units.[3] In 1987, more than half of Honolulu's 53,898 leasehold units were controlled by twenty-four (24) lessors[4] and only sixty (60) owners controlled the fee simple title to more than 50% of all 73,000 condominium units in Honolulu, leasehold and fee simple.[5] Indeed, the breadth of the "leasehold system's" reach into Honolulu's economy is demonstrated by the fact that each and every city council member (including all of those who voted against Ordinance 91-95) disclosed conflicts of interest with respect to the Ordinance. (Petition at 24).

In the late 1980's and early 1990's, the Honolulu City Council recognized that the "leasehold" system of home

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[1] A study performed for the Hawaii Legislature in 1987 concluded that "on Oahu, where the majority of residential condominium and cooperative projects are located, 60% or 518 of the projects and over 70% or 53,898 of the units are leasehold." Pet. App. 163a.

[2] Pet. App. at 192a.

[3] In their moving papers filed in the District Court, the Bishop Estate Trustees represented that they "owned the leased fee interest under approximately 12,500 condominium units at the time the ordinances were approved." (C.R. 28, page 8.)

[4] Pet. App. 191a.

[5] *Id.*

ownership presented serious potential problems for the county's housing supply and economy. Because buyers of leasehold condominiums ordinarily finance their purchases by mortgaging their leasehold interests, the passage of time presented the serious potential that owners of leasehold condominium units would soon be unable to sell their homes due to the unavailability of conventional financing. Hence, a 1987 study concluded:

> if there were no further lease to fee conversions, by 1990, 31% of the existing leasehold projects, or 21% of the existing leasehold units could become ineligible for 30-year commercial financing. Approximately 2% of existing leasehold projects, representing only 1% of existing leasehold units, would also then be ineligible for 15-year commercial financing.

(C.R. 8, Exhibit CC page xvii).

Obviously, as time went on, this problem affecting the resale market of a substantial portion of Honolulu's housing supply was going to become more and more severe. As the Hawaii State Legislature observed with respect to leasehold single family housing:

> residential leaseholds have also undesirable social effects. Lease rent negotiations are usually scheduled every 10 to 15 years after the initial fixed rent period of 25 to 30 years. Thus, as the lessee advances in age and his [or her] income potential declines, his [or her] lease rentals increase, causing him [or her] to give up the lease and look for other accommodations. Then, when the entire lease period expires, the lessee who has stayed on the leasehold for the full term of the lease is, by reason of age, income,

> and the lack of value remaining in the leasehold, left without means to purchase another home.

*Housing Finance & Dev. Corp. v. Castle*, 79 Haw. 64, 898 P.2d 576, 593 fn.10 (1995), quoting 1975 Haw. Sess. L. Act 184, at 408-29.

In 1990, the Honolulu City Council responded to public policy concerns regarding rapid escalation in lease rents, the same way that municipalities across the United States have responded: by enacting a rent control ordinance. Yet, because of the unique characteristics of Hawaii's pattern of "leasehold" development and sale of housing, the United States District Court for the District of Hawaii held the rent control ordinance unconstitutional. *Richardson v. City and County of Honolulu*, 759 F. Supp. 1477 (D. Hawaii 1991). The District Court's decision was based on a thorough analysis and application of this Honorable Court's decision in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). 759 F. Supp. at 1494-5.

In 1991, still seeking to address the social problems stemming from Hawaii's leasehold condominium ownership, the Honolulu City Council enacted Ordinances 91-95 and 91-96.[6] The City Council's findings in support of Ordinance 91-95 included the following:

> The historical pattern of land ownership on Oahu has led to the practice of landowners leasing rather than selling their land. Ownership of land beneath residential condominium apartments, cooperative housing units and residential

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[6] Ordinance 91-96 is a rent control ordinance which is the subject of a Cross-Petition for Certiorari.

> planned developments on Oahu is consistent with this pattern and is concentrated in the hands of the owners of such land who have refused to sell proportionate shares in their fee simple titles to such land to the lessees . . .
>
> Under the burden of increased lease rents, many owner-occupants of residential condominium apartments, cooperative housing units and planned development units, especially those on fixed incomes, have found, and will continue to find themselves unable to afford to continue living in their homes. If they are displaced from those homes, these owner-occupant lessees could be displaced entirely from the ranks of home-owners because of Oahu's continuing housing crisis. . . .
>
> These lessees have been forced to accept long-term leases or renewed leases of such land which contain terms and conditions that are financially disadvantageous to them, that restrict their freedom to fully enjoy such land and that are weighted heavily in favor of the landowners; or to surrender title to and possession of their residential condominium, cooperative and planned development homes at the expiration of their current leases.

Pet. App. 105a.

Ordinance 91-95 is narrowly tailored to address its public purposes. It grants the right of lease-to-fee conversion ***only to owner-occupants*** of Honolulu leasehold condominium units. The data before the City Council indicated that there were approximately 16,000 to 17,000 owner occupied leasehold units in Honolulu at the time the ordinance was enacted. Pet. App. 162a; *Richardson v.*

*City and County of Honolulu*, 759 F. Supp. 1477, 1493 (D. Hawaii 1991).

In the mid to late 1980's, after the Hawaii Legislature and City and County of Honolulu began contemplating lease-to-fee legislation (Petition at 24), as well as rent control legislation, some lessors of condominium units voluntarily sold their fee simple interests to condominium lessees in the face of pending legislation. Nevertheless, despite these "voluntary" sales, even at the end of 1991 the Petitioners concede that fully one-half of Honolulu's condominium units were still leasehold. (Petition at 7).

Petitioner Bishop Estate filed the instant suit in the U.S. District Court for the District of Hawaii immediately after Ordinance 91-95 was enacted. On cross-motions for summary judgment, the District Court upheld the constitutionality of Ordinance 91-95. The District Court again carefully considered and correctly applied the standard defined by this Court in *Midkiff*:

> Bishop Estate maintains that the ordinance is based on the incorrect assumption that a concentration of land ownership currently exists with respect to land leased for condominiums which is similar to the oligopoly which justified the Land Reform Act in the single-family home context. Bishop Estate contends that there is no concentration of land ownership in relation to leased land underlying condominium projects.
>
> The court finds no merit to this argument. The Supreme Court in *Midkiff* repeatedly emphasized the substantial deference which should be accorded to the relevant legislative body in the area of public use. 467 U.S. at

> 239-43, 104 S. Ct. at 2328-31. In the present case, the City Council determined that ownership of land beneath residential condominium projects is concentrated in the hands of owners who have refused to sell proportionate shares in their fee simple units. Ord. 91-95 Section 1. Thus, the City Council's primary concern was apparently the inability of the owners of leasehold condominiums to purchase proportionate shares of the underlying fee simple title. While the current concentration of land ownership with respect to leasehold condominiums may not be as drastic as the land oligopoly which prompted the Land Reform Act, this contention does not undermine the City's determination that permitting leasehold condominium owners to purchase the underlying property serves a legitimate public purpose.

The District Court also noted in a footnote that the record revealed a substantial level of concentration of ownership of fee simple title to leasehold condominium units:

> Nevertheless, the court notes that Bishop Estate's own filings reveal that in 1987 the land underlying 45% of the condominium projects in Hawaii was owned by only 51 lessors. . . . Furthermore, at the time Ordinance 91-95 was enacted, Bishop Estate alone owned the fee simple interest under approximately 12,500 of [Honolulu's] leasehold condominium units.

Pet. App. 70a n. 24.

On appeal, the Ninth Circuit Court of Appeals carefully applied the principles of *Midkiff* to Ordinance 91-95 and again upheld the ordinance:

> Here, as in *Midkiff*, the requirement of just compensation ensures that individuals will not be forced to bear public burdens, which in all fairness should be borne by the public as a whole. Heightened scrutiny is thus inappropriate. The language used throughout *Midkiff* indicates that deference to the legislative body's public use determination is required when the taking is fully compensated. *See, e.g., Midkiff*, 467 U.S. at 241, 104 S. Ct. at 2329-30 ("[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.").
>
> . . .

Pet. App. at 13a.

The Court of Appeals recognized that under *Midkiff* the power to determine whether there is excessive concentration of ownership of condominium fees simple rests with the City Council, not with the court:

> The City determined that the price of condominiums was higher because the ownership of the fee simple titles to the land underneath the condominiums was excessively concentrated. While the hearings produced conflicting testimony, one study presented to the City showed that the largest 20 Landowners own 34.9% of the land under condominium units in Honolulu, and that the largest 60 own 50.4%. [citation omitted]. While the largest 20 landowners own a smaller percentage of land underneath condominiums than the largest 22 owned of the fee simple titles when the Court decided *Midkiff*, *see Midkiff*, 467 U.S. at 232, 104 S. Ct. at 2325, the concentration of ownership of land underneath condominiums

> is greater than the concentration of land ownership throughout the state at the time *Midkiff* was decided. . . . We thus cannot say that the City's finding is without reasonable foundation.

The Ninth Circuit Court of Appeals, applying this Honorable Court's legal standard articulated in *Midkiff*, thus held that Ordinance 91-95 was an appropriate exercise of the City's eminent domain power for an appropriate public purpose:

> Under the rational basis test, we hold that the Ordinance is constitutional under both the United States and Hawaii constitutions. Regardless of what has occurred with single-family dwellings, the City rationally could have believed that, if the supply of condominiums increased (through the lease-to-fee measure of Ordinance 91-95), the price of those condominiums would decrease. Additionally, although the price of single-family houses increased dramatically between 1987 and 1990, there is no indication that the price would not have gone up even more without the Act's lease-to-fee mechanism.

Pet. App. at 17a.

The Ninth Circuit also recognized the intensifying serious concerns for the county's housing supply if action is not taken.

> Finally even if the price of condominiums does not decrease as a result of the Ordinance, some of the public purposes of the Ordinance will be served. If a family is allowed to purchase its condominium, that family will not risk being thrown out of its home in 25 years because the family cannot afford the renegotiated rent. The City rationally could have concluded that the

> lease-to-fee mechanism would remedy defects in the housing market and stabilize Oahu's economy.

Pet. App. at 17a.

In footnote 5 of its Petition, Bishop Estate disingenuously attempts to belittle the above-quoted finding. The Ninth Circuit recognized one of the precise dangers which the leasehold system creates, and the instant legislation addresses: the concern that if a lessee cannot purchase his fee simple interest now, he may make mortgage (and lease-rent) payments for a number of years into the future until (perhaps after reaching retirement age) the lease-rent is "renegotiated" and becomes unaffordable to the "homeowner" whose housing options at that time may be non-existent. The Ninth Circuit recognized that Ordinance 91-95 alleviates this problem by enabling condominium "owners" to become actual homeowners while assuring that the lessors will receive "just compensation" for their rights.

## REASONS FOR DENYING THE WRIT

### There Is No Conflict Among The Circuits

The principle of this Court's *Midkiff* decision has been uniformly and properly applied. Even the Petitioners concede that the lower court's decisions applied the law consistently with the standards set forth in *Midkiff*. As the Petitioners acknowledge:

> Eminent domain is a policy option that applies only to a small subset of economic problems, and, even with respect to those problems, it is

> typically only one of many tools available to the government.

Pet. at 21.

*Midkiff* held that such takings satisfy the public use requirement:

> where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a ***compensated taking*** to be prescribed by the Public Use Clause.

467 U.S. at 241.

> Judicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power. State legislatures are as capable as Congress of making such determinations within their respective spheres of authority. See *Berman v. Parker*, 348 U.S. at 32, 75 S.Ct. at 102. Thus, if a legislature, state or federal, determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use.

467 U.S. at 244.

The public purposes of Ordinance 91-95 are thoroughly set out in the legislative findings contained in Section 1. The City Council has identified a number of social problems stemming from the pervasive leasehold condominium system on Oahu and has developed a rational means of addressing these problems via lease-to-fee conversion. The public purposes include encouragement of home ownership rather than renting; reduction of the

likelihood that a significant portion of Honolulu residents who have made mortgage and lease payments for many years will be rendered homeless at the time when they reach retirement age and financially unable to purchase another home; reduction of the serious shortage of fee simple condominium and cooperative housing unit land; and elimination of artificial inflation in prices of fee simple condominium and cooperative housing unit land. Each of these public purposes is more than just "conceivable" as required under *Midkiff*. Rather, the public purpose in encouraging a free market in fee simple housing is a critical function of local government. The public purposes served by Ordinance 91-95 are similar, if not identical, to those recognized and upheld in *Midkiff*.

The applicable legal standard requires that Ordinance 91-95 be upheld as long as it has a rational relationship to the public purposes identified by the City Council. The Court is precluded from second-guessing the wisdom of the legislation or questioning the likelihood that it may succeed in achieving its public purposes:

> Of course, this Act, like any other, may not be successful in achieving its intended goals. But "whether *in fact* the provision will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if. . . the . . . [state] Legislature *rationally could have believed* that the [Act] would promote its objective." [citations omitted]. When the legislature's purpose is legitimate and its means are not irrational, our cases make it clear that empirical debates over the wisdom of the takings – no less than debates over the wisdom of other kinds of

> socioeconomic legislation – are not to be carried out in the federal courts. Redistribution of fees simple to correct deficiencies in the market determined by the state legislature to be attributable to land oligopoly is a rational exercise of the eminent domain power. Therefore, the Hawaii statute must pass the scrutiny of the Public Use Clause.

467 U.S. at 242-3.

The Petitioners' takings claim, in essence invites the Court to create a dual standard for evaluation of ***compensated takings***. Thus, Petitioners ask this Court to create a new legal standard in which for some compensated takings the federal courts would have to become involved in heretofore prohibited "empirical debates over the wisdom of the takings" which will be effected by Ordinance 91-95. As this Honorable Court recognized in *Midkiff*, such "empirical debates" are not the appropriate function of the federal courts. Thus, it would be wholly inappropriate and unworkable for this Court to accept Petitioners' invitation to establish a new "heightened scrutiny" standard for evaluation of some eminent domain proceedings. The Court should not require the federal courts to entertain an evidentiary proceeding over whether or not the number of lessors is so concentrated as to justify the ordinance; whether inflation in prices of fee simple condominiums will be favorably effected by the ordinance or other questions about the wisdom of the ordinance. That debate properly took place at length before the City Council and *Midkiff* demonstrates that the debate is not subject to second guessing by this Court.

Ordinance 91-95 rationally addresses legitimate public concerns over Honolulu's housing supply. *Midkiff* teaches that the takings clause requires no more. Because there is no conflict among the Circuits on the standards defined by *Midkiff* and there are no other reasons to change *Midkiff*'s principles, the Petition for Certiorari should be denied.

**Petitioners' Attempt To Distinguish *Midkiff* Fails**

The Petitioners ask this Court to abandon *Midkiff* and create a new constitutional standard applicable to the exercise of the eminent domain power where the following three characteristics are present: (1) the alleged "lack of social surplus" due to the fact that the property will be used for housing before, during and after condemnation; (2) lack of public funds to pay just compensation; and (3) the legislative body exercising eminent domain power is a city government as opposed to a State Legislature. Petition at 14-18.

Petitioners have failed to provide any reasonable basis for adoption of a new constitutional standard. At best, the Petitioners have identified "distinctions without a difference" and on several of their points the petitioners cannot even identify a distinction from *Midkiff*.

*"Social Surplus"*. The Petitioners assert that *Midkiff* should not apply where there is an "[a]bsence of a change in use of the property." Petition at 14-15. In other words, the Petitioners argue that "heightened scrutiny" should be adopted because the property which is the subject of condemnation was used for "housing" before the condemnation and is expected to continue to be used for

"housing" during and after the condemnation. Of course, this was exactly the situation in the *Midkiff* case, where this Honorable Court expressly recognized that "lessees retain possession of the property for private use throughout the condemnation process." 467 U.S. at 243. Thus, the fact that the property which is the subject of lease-to-fee conversion will continue to be used for housing after it is converted to fee simple housing provides no distinction at all from *Midkiff*.

*Just Compensation Paid By Lessees.* Under Ordinance 91-95, as in *Midkiff*, it is anticipated that the condemned property will be sold to lessees, thus accomplishing the "lease-to-fee conversion." Hence, the result under Ordinance 91-95 is expected to be precisely the same as this Court observed in *Midkiff*: "funds to satisfy the condemnation awards have been supplied entirely by lessees". 467 U.S. at 234. Once again, the Petitioners completely fail to identify any reason to deviate from the standard established in *Midkiff*.

*Legislation Enacted By City Council.* Petitioners next claim that lease-to-fee legislation passed by a city council elected by a community of approximately 1 million citizens is subject to a higher level of constitutional scrutiny than legislation passed by a State legislature. Legislation passed by Honolulu's legislative body is entitled to the same treatment as any other legislative body acting pursuant to State law. There is no constitutional distinction based on the number of members passing the legislation nor on the number of constituents they represent. *Midkiff* defines the constitutional standard for governmental use of the eminent domain power regardless of whether the

power is exercised by a City Council governing a population of 8 million or a State legislature elected from a population of 2 million citizens. Neither the size of the legislative body enacting challenged legislation, nor the size of the population that elected the body, provide any basis to establish a new constitutional standard separate from *Midkiff*.

## CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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